**U.S. Department of Labor**

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0286 BLA

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| ANNETTE L. CODY<br>(Widow of JOHN CODY)<br><br>Claimant-Respondent<br><br>v.<br><br>NATIONAL MINES CORPORATION<br><br>and<br><br>OLD REPUBLIC INSURANCE COMPANY<br><br>Employer/Carrier-<br>Petitioners<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED: 03/02/2017<br><br>DECISION and ORDER |

Appeal of the Decision and Order of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery), Prestonsburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2012-BLA-5447) of Administrative Law Judge John P. Sellers, III awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on May 4, 2011.

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012),[1] the administrative law judge credited the miner with twenty-seven years of underground coal mine employment,[2] and found that the evidence established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant[3] invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Employer therefore argues that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer further argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012). Claimant cannot benefit from this provision, as the miner's claim for benefits was denied. Director's Exhibit 1.

[2] The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Claimant is the surviving spouse of the miner, who died on February 26, 2005. Director's Exhibit 8.

Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its previous contentions.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

**Invocation of the Section 411(c)(4) Presumption**

Employer contends that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2).[5] Employer initially contends that the administrative law judge erred in finding that the pulmonary function study and arterial blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii).

The administrative law judge accurately noted that all six of the pulmonary function studies of record, and seven of the nine arterial blood gas studies of record, produced qualifying values.[6] Decision and Order at 15; Director's Exhibits 10, 12, 13. Because no physician questioned the validity of the pulmonary function studies or the blood gas studies, the administrative law judge found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii). Decision and Order at 15.

Employer contends that the administrative law judge erred in finding that the pulmonary function and blood gas study evidence supported a finding of total disability

[4] Because employer does not challenge the administrative law judge's finding that the miner had twenty-seven years of underground coal mine employment, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] Although employer currently challenges the administrative law judge's determination that the evidence established that the miner suffered from a totally disabling pulmonary impairment, employer essentially conceded the issue in its post-hearing brief, stating that: "Claimant appears entitled to the [Section 411(c)(4)] rebuttable presumption since the miner had [a] disabling pulmonary impairment and worked underground for more than [fifteen] years." Employer's Post-Hearing Brief at 9.

[6] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study yields values that exceed those in the tables. 20 C.F.R. §718.204(b)(2)(ii).

because the studies were performed "during or soon after an acute respiratory or cardiac illness."[7] Employer's Brief at 7, quoting 20 C.F.R. Part 718, Appendices B and C. Because employer raises its objection to the validity of the qualifying pulmonary function study and blood gas study evidence for the first time on appeal, however, we decline to consider it. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003); *Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73, 1-75 (1986). We therefore affirm the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii).

Employer next argues that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the medical opinions of Drs. Rosenberg, Jarboe, and Westerfield. The administrative law judge noted that while Dr. Westerfield opined that the miner suffered from a "severe respiratory injury," the doctor did not opine that the miner was disabled or otherwise unable to perform his last coal mine work.[8] Decision and Order at 15; Claimant's Exhibit 3. However, the administrative law judge noted that employer's physicians, Drs. Rosenberg and Jarboe, opined that the miner "was totally disabled from a pulmonary or respiratory perspective and would be unable to return to his last coal mine employment or similar arduous labor." Decision and Order at 15; Employer's Exhibits 1, 2, 3 at 21, 4 at 15. Consequently, based upon a weighing of all the evidence, the administrative law judge found that the evidence established that the miner suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).

Employer argues that the administrative law judge erred in not considering whether the physicians who opined that the miner suffered from a totally disabling

[7] The record reflects that the pulmonary function and blood gas studies were submitted as part of the miner's hospitalization and treatment records. Director's Exhibits 10, 12, 13; Employer's Exhibit 1. Thus, contrary to employer's argument, the pulmonary function and blood gas study evidence is not subject to the quality standards set forth in 20 C.F.R. Part 718, as they were not generated in connection with a claim for benefits. *See* 20 C.F.R. §718.101(b); *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008). Rather, the issue before the administrative law judge was whether the studies were sufficiently reliable, despite the inapplicability of the quality standards. In assessing the reliability of the studies, the administrative law judge accurately observed that "[n]one of the physicians who reviewed the medical records suggested that the tests were improperly performed or were otherwise invalid." Decision and Order at 15.

[8] Contrary to the administrative law judge's characterization, Dr. Westerfield opined that the miner "suffered total respiratory disability." Claimant's Exhibit 3 at 5.

pulmonary impairment were aware of the exertional requirements of the miner's usual coal mine employment. Employer, however, has not explained how the administrative law judge's error undermines his assessment of the evidence at 20 C.F.R. §718.204(b)(2). *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference"). Even if the administrative law judge discredited the opinions of Drs. Rosenberg, Jarboe, and Westerfield, there is no medical evidence that supports a finding that the miner was not disabled from a pulmonary standpoint. Thus, there is no medical opinion evidence to be weighed against the pulmonary function and blood gas study evidence, both of which the administrative law judge found sufficient to establish total disability. Consequently, because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence, when weighed together, established total disability pursuant to 20 C.F.R. §718.204(b)(2).

In light of our affirmance of the administrative law judge's finding that claimant established twenty-seven years of underground coal mine employment, and his finding that the miner suffered from a totally disabling respiratory impairment, we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

**Rebuttal of the Section 411(c)(4) Presumption**

Because claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to rebut the presumption by establishing both that the miner did not have legal and clinical pneumoconiosis,[9] 20 C.F.R. §718.305(d)(2)(i), or by establishing that "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). The administrative law judge found that employer failed to establish rebuttal by either method.

After finding that employer established that the miner did not have clinical pneumoconiosis, the administrative law judge addressed whether employer established

[9] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

that the miner did not have legal pneumoconiosis. The administrative law judge considered the opinions of Drs. Rosenberg and Jarboe. Drs. Rosenberg and Jarboe opined that the miner suffered from severe chronic obstructive pulmonary disease (COPD) due to cigarette smoking and not coal mine-dust exposure. Employer's Exhibits 5, 6. The administrative law judge discredited their opinions because he found them inconsistent with the scientific evidence credited by the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions. Decision and Order at 19-22. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis.

Initially, we reject employer's contention that the administrative law judge erred in referring to the preamble to the 2001 regulatory revisions in determining the credibility of the medical opinion evidence. It was within the administrative law judge's discretion to rely on the preamble as a guide to assess the credibility of the medical evidence in this case. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 802, 25 BLR 2-203, 2-211 (6th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-383 (3d Cir. 2011).

We also reject employer's contention that the administrative law judge erred in discrediting the opinions of Drs. Rosenberg and Jarboe. The administrative law judge correctly noted that Drs. Rosenberg and Jarboe eliminated coal mine-dust exposure as a source of the miner's obstructive pulmonary disease, in part, because they found a significant reduction in the miner's FEV1/FVC ratio which, in their opinions, was inconsistent with obstruction due to coal mine-dust exposure.[10] Decision and Order at

[10] In attributing the miner's obstructive pulmonary disease to cigarette smoking instead of coal mine-dust exposure, Dr. Rosenberg specifically opined that when coal mine-dust exposure causes obstruction, the general pattern is that of a reduced FEV1, with a corresponding reduction of the FVC, such that the FEV1/FVC ratio is generally preserved. Employer's Exhibit 1 at 6. Specific to the miner's situation, Dr. Rosenberg noted there was "a severe reduction of his FEV1 with a markedly reduced FEV1/FVC ratio," indicating that his obstruction was related to smoking, not coal mine-dust exposure. *Id.* at 7. Dr. Jarboe similarly opined that "a disproportionate reduction of FEV1 compared to FVC is the hallmark of the functional abnormality seen in cigarette smoking and/or asthma and not coal dust inhalation." Employer's Exhibit 2 at 11. Dr. Jarboe opined that "when the inhalation of coal mine[-]dust causes an impairment, there tends to be a parallel reduction of FVC and FEV1." *Id.* at 12. Specific to the miner's situation, Dr. Jarboe opined that when the miner's spirometric pattern (preserved FVC with a disproportionately reduced FEV1) is combined with the miner's very heavy smoking history, it is reasonable to conclude that the miner's impairment was caused by smoking and not coal mine-dust exposure. *Id.* at 14.

25-26, 30; Employer's Exhibits 7, 8. The administrative law judge permissibly discredited the opinions of Drs. Rosenberg and Jarboe because their reasoning for eliminating coal mine-dust exposure as a source of the miner's obstructive pulmonary disease is in conflict with the medical science accepted by the DOL, recognizing that coal mine-dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio.[11] *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); Decision and Order at 26. Because the administrative law judge permissibly discredited the opinions of Drs. Rosenberg and Jarboe,[12] we affirm the administrative law judge's finding that employer failed to establish that the miner did not suffer from legal pneumoconiosis.[13] *See* 20 C.F.R. §718.305(d)(2)(i)(A).

Upon finding that employer was unable to disprove the existence of pneumoconiosis, the administrative law judge addressed whether employer could establish rebuttal by establishing that "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii). The administrative law judge rationally discounted the opinions of Drs. Rosenberg and Jarboe that the miner's death was not due to pneumoconiosis, because Drs. Rosenberg and Jarboe did not diagnose legal pneumoconiosis, contrary to the administrative law judge's

[11] Employer notes that Dr. Rosenberg explained that "new and far more comprehensive studies showed that the notion that coal dust and cigarette smoking cause equal decrements in lung function is inaccurate." Employer's Brief at 21. Employer, however, does not challenge the Department of Labor's (DOL's) position as articulated in the regulation's preamble, that coal mine-dust exposure can also cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. In order to do so, employer would have to submit "the type and quality of medical evidence that would invalidate the DOL's position in that scientific dispute." *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014) (internal quotation marks omitted). Employer has presented no such evidence.

[12] Because the administrative law judge provided a valid basis for discrediting the opinions of Drs. Rosenberg and Jarboe, any error he may have made in discrediting their opinions for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Rosenberg and Jarboe.

[13] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i).

finding that employer failed to disprove the existence of legal pneumoconiosis.[14] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013). We therefore affirm the administrative law judge's finding that employer failed to establish that no part of the miner's death was caused by pneumoconiosis and further affirm the award of benefits. 20 C.F.R. §718.305(d)(2)(ii).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[14] Drs. Rosenberg and Jarboe attributed the miner's death in part to chronic obstructive pulmonary disease (COPD). Employer's Exhibits 1 at 6, 3 at 19. The administrative law judge previously found that employer failed to establish that the miner's COPD did not constitute legal pneumoconiosis.